IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL REVISION APPLICATION No 342 of 1994

For Approval and Signature:

Hon'ble MR.JUSTICE J.R.VORA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

NAVINCHANDRA HAKAMCHAND SHAH

Versus

VISHNUPRASAD M BHATT,FOOD INSPECTOR,BHAVNAGAR

Appearance:

1. Criminal Revision Application No. 342 of 1994

MR KJ SHETHNA for Petitioners No. 1-2

RULE SERVED for Respondent No. 1

MR HH PATEL PUBLIC PROSECUTOR for Respondent No. 2

CORAM : MR.JUSTICE J.R.VORA

Date of decision: 19/10/2001

ORAL JUDGEMENT

#. This Revision Application is filed by the original accused of Criminal Case No.961/1994 of the Court of Chief Judicial Magistrate, Bhavnagar being aggrieved and

dissatisfied by the judgment and order of learned Additional Sessions Judge, Bhavnagar in Criminal Appeal No.17/1986 pronounced on 5.8.1994 by which the learned Additional Sessions Judge confirmed the conviction of the present accused under Section 7(i) (v) and under Section 16(i)(A)(i)(ii) of the Prevention of Food Adulteration Act, 1955 as awarded by learned Chief Judicial Magistrate, Bhavnagar on 30.10.1985.

#. The brief facts goes to suggest that on 11.2.1984 from the accused No.3 - a partnership firm M/s.Bharat Provision Stores and from the accused No.2 - Navinchandra Ex-partner, the complainant - Vishnuprasad M. Bhatt Food Inspector, Bhavnagar Municipal Corporation took 500 grams of Chilly powder as a sample for being sent for analysis. The other partners of the firm original accused No.1 Jayantilal had since died the case against him was abatted. As per the prosecution case, after following due procedure the sample purchased from the accused was sent to the Public Analyst and the Public Analyst found that the sample of the Chilly powder contained the colour oil soluble dye and was adulterated. Upon the strength of this report sanction to prosecute the accused was obtained from the competent authority by the complainant and a complaint came to be filed against all the 3 accused under Sections 7 and 16 of the Prevention of Food Adulteration Act, 1954. It appears that the other sample was sent to the Central Food Laboratory and the report of the same indicated that the sample was adulterated. After the deposition of the complainant, charge under above Sections of Prevention of Food Adulteration Act, 1954 came to be framed against the accused who pleaded not guilty and after recording the evidence, the learned Chief Judicial Magistrate, Bhavnagar came to a conclusion that accused Nos.1 and 2 were guilty for the offence under Section 16(i) (A) (i) (ii) and Section 16(i-A) (i) (ii) and, therefore, accused Nos.1 and 2 were sentenced to undergo R.I. of 1 year and each of the accused Nos.1 and 2 were sentenced to pay fine of Rs.2,000/-. Accused No.3 being Partnership Firm was sentenced to pay fine of Rs.2,000/-. Being aggrieved by the decision of Chief Judicial Magistrate, Bhavnagar, all the 3 accused filed Criminal Appeal No.17/1986 in the Court of Sessions Judge, Bhavnagar and learned Additional Sessions Judge, Bhavnagar vide his judgment and order dated 5.8.1994 dismissed the appeal and, hence, this Revision Application is preferred by the accused Nos.2 and 3.

#. Learned Senior Counsel Mr.K.J.Sethna, for the petitioner and learned APP Mr.H.H.Patel, for the respondent No.2 - State of Gujarat were heard.

Respondent No.1 is served.

#. Learned Senior Counsel Mr.Sethna on behalf of the petitioner urged various contentions of facts as well as of law against the decisions of both the lower Courts, while learned APP Mr. Patel urged that there is a concurrent finding of both the Courts below and ordinarily High Court under powers of 401 should not upset or disturb those findings. He has relied upon the case of State of Karnataka vs. Appa Balu Ingale and others, reported in AIR 1993 Supreme Court 1126. Ultimately during the hearing, controversy was restricted to narrow compass that, whether there is a breach or due compliance of Rule 14 of Prevention of Food Adulteration Rules, 1955. Learned advocate Mr.K.J.Sethna drawing the attention of this Court to the evidence of Food Inspector urged that there is a clear breach of mandatory provisions of Rule-14 of Prevention of Food Adulteration Rules, 1955 and, therefore, the accused - present petitioners are entitled to acquittal.

#. Rule-14 of Prevention of Food Rules, 1955 is as under :-

"14. Manner of sending samples for analysis.-Samples of food for the purpose of analysis shall be taken in clean dry bottles or jars or in other suitable containers, which shall be closed sufficiently tight to prevent leakage, evaporation, or in the case of dry substance, entrance of moisture and shall be carefully sealed.

#. Now, with reference to the above provision, the factual aspects to the case would be required to be taken into consideration. Learned advocate for the petitioners has provided certified copies of the evidence recorded in the trial Court. Vide Ex.9 PW No.1 Vishnuprasad - the complainant, so far as the aspect of Rule-14 is concerned, has deposed as under which is relevant for the purpose to adjudicate the controversy between the parties. In the examination-in-chief, PW No.1 - Food Inspector has categorically stated that chilli powder was purchased after getting it "weighed at 500 grams in one plastic bag." The Food Inspector has further stated in his deposition i.e. in his examination in chief further that "thereafter 3 clean dry glass bottles with proper lids which were taken to the shop after verifying that the same were cleaned and empty, the chilli powder which was purchased was equally divided in 3 portions and kept in these 3 bottles and the lid was tightened and fixed."

In his cross-examination, the Food Inspector has stated that "the chilli powder was purchased from the accused and was stored in glass bottles and those bottles were cleaned by my peon in my presence. Those glass bottles were cleaned by my peon, has not been noted in any register. I do not remember on which date this bottles were cleaned."

#. From the above it has been vehemently urged that Rule-14 which clearly mandates that the sample of food for the purpose of analysis shall be taken in clean and dry bottle or jar is expressly breached by the Food Inspector. In this respect learned APP Mr.Patel has urged that since there is a concurrent finding of both the Courts below, this Court should not interfere with the order of conviction as confirmed by both the lower Courts.

#. Considering the rival contentions and having taken into consideration the law laid down in this respect, it clearly appears that there is a breach of Rule 14 committed by the Food Inspector. So far as closed bottles in which the chilli powder was stored and sealed is concerned, in cross-examination, the Food Inspector states that these glass bottles were cleaned by his peon in his presence. In addition to this, Food Inspector also deposes that he could not remember on which date those bottles were cleaned by his peon nor it was noted anywhere that the bottles were cleaned on certain day or date. In these circumstances, it is amply clear that the prosecution has failed to prove beyond doubt that when the sample of chilli powder was obtained and stored in glass bottles, those bottles were dried and cleaned. Though there is evidence that the bottles were cleaned by the peon of the Food Inspector, however, again the same Food Inspector deposes that he could not remember when the bottles were cleaned by his peon, meaning thereby, there is no evidence that the bottles were cleaned or dried before collecting the sample in the said bottles. This is not enough, so far as the facts are concerned it is urged on behalf of the petitioners that the breach committed goes a step further. It was urged that in fact when the sample was collected after purchasing it was stored in the plastic bags. The contention has substance because while going through the evidence of Food Inspector he has categorically stated that the chilli powder sample was first obtained in plastic bag and was purchased 500 grams in quantity, meaning thereby that before storing the chilli powder in the bottles the same was first obtained in a plastic bag. Now, there is no evidence at all that the said plastic bag was clean and

dry and therefore, in this case the breach of mandatory Rule-14 is committed. Firstly, the prosecution has failed to prove that the plastic bag in which the sample was first obtained was cleaned and dried and, secondly, the bottles in which thereafter chilli powder was stored were cleaned and dried as said above. It is the duty of the Food Inspector not only to comply with Rule-14 but to prove during the trial that Rule-14 was scrupulously followed and the bottles in which the sample was obtained were cleaned and dried and were properly sealed. In this case, the prosecution has failed to prove this important aspect and breach of mandatory Rule-14 is committed.

#. While examining case on facts it emerges that breach of Rule-14 is committed. So far as the law is concerned, this Court has taken consistent view in so many decisions that Rule-14 of Prevention of Food Adulteration Rules 1955, is a mandatory provision and breach of which would result into acquittal of the accused. The first decision is of this Court in the matter of M.B.Risaldar vs. Radheshyam Ramdhar Agarwal & Anr., as reported in GLR Vol.XXI (2) 136. In the similar circumstances, this Court observed that, there should be evidence that bottle should be properly cleaned and if direct evidence is there and then after looking by naked eye also, the bottle looks clean and dry then the matter is with the prosecution. But if the evidence is not there, then the benefit of that certainly go to the accused. This Court in the above said decision observed as under in Paras-6 and 7.

"6. It is the case of the accused further that the bottle in which samples were taken is not proved to be cleaned and dried. On this count, the learned Magistrate accepted the contention of the accused and acquitted him. Miss Valikarimwala, the learned Advocate for the appellant very strongly urged before me that this finding arrived at by the learned Magistrate is not justified.

... ...

It is the submission of Miss Valikarimwala that the evidence of the food inspector Manubhai Pandya very categorically showed that he had transferred the samples in three glass bottles which were cleaned and dried. It is her submission that when the food inspector has stated so in clear terms, it should be presumed that he had followed the official act properly

and the learned Magistrate should not have doubted that testimony. I quite agree with her that if the testimony of the food inspector had remained as it was, then there was no ground to doubt it and the Court was not justified in creating a doubt. But during the cross-examination, questions were put to the food inspector specifically as to under what circumstances he found that the bottles were dried and cleaned. For that, he has merely to say that looking to the bottles by naked eyes, he found them to be dried and cleaned. He was put specific questions and he stated that the utensil and the bottle were taken by him from his cupboard. He did not know how may bottles were there in his cupboard at that time this can be justified because of the time of deposition one would not know how many bottles were there in the cupboard when he went for raid. He may not also know as to when those bottles wee used. But the important evidence is that the bottles were kept in the cupboard by his peon after washing. He could not say when they were kept. He also could not say when the peon washed the bottles. All this evidence can be appreciated because he may not remember when the peon washed the bottles at time of deposition nor can he remember as to when they were put in the cupboard. The most important answer is that the bottles were washed by peon Bagare according to his instructions. But then he had to admit that they were not washed in his presence So all the evidence given by him that bottles were dried and cleaned and they were cleaned and put by the peon under his instructions goes away by a sentence that they were not washed in his presence. If the bottles are not washed in his presence, how can it be said that they were cleaned by the peon according to his instructions and direction ? In order to prove that instructions were properly followed, the person who gives instructions has to testify that actual procedure was done in his presence according to his instructions. If he does not say so and merely states that the peon washed the bottles according to his instructions, it is merely a statement on assumption and not a statement of fact. On this count, the learned Magistrate relied on an unreported judgment printed at 1977, U.C.R. (Bom.) 530, which is a judgment of Jahagirdar, J. in the case of the State of Maharashtra V. Ram Murat Dube, in

Criminal Appeal No.98 of 1976 decided on 15th April, 1977. In that case, evidence was given by the food inspector that he did not clean and dry the bottles in which samples were taken. But the deposed that, that part of the work was done by his assistant. To a pointed question in the cross-examination, he admitted that he did not know when the assistant did it. On this evidence, the Bombay High Court held that it was, therefore, impossible to hold that the food inspector who has been examined proved that the bottles were cleaned or dried as required under the rule. This could have been proved by the assistant who is alleged to have done that part of the work.

7. There is no judgment of this Court or the Supreme Court showing to the contrary. Even I feel that when a witness testifies to the effect that the glass bottles were cleaned and dried, a mere visual appearance to the naked eye may not be sufficient sometimes. If no questions might have been put to him as to how he can say that the glass bottles were cleaned and dried, probably the matter would have ended there. But he has given out that the peon had cleaned and dried the bottles and put them into the cupboard. In this state of the evidence, it was the duty of the prosecution to examine that peon to show that bottles were properly cleaned and dried and they were put into the cupboard and properly closed. It is true that I would not go to the extent of observing as the learned Magistrate has done that there might be some microscopic dirt remaining in the bottle. But then there should be evidence that it was properly cleaned and if that direct evidence is there and then after looking by a naked eye also, the bottles looked cleaned and dried, then the matter is with the prosecution. But if the evidence is not there, then benefit of that must certainly go to the accused.

##. Thereafter, this Court in the matter of State of Gujarat vs. Sohanlal Trikamchand Shah & Ors, reported in GLR 1995(2), again ruled that Rule-14 is mandatory in nature and it is the duty of the prosecution to prove beyond reasonable doubt that all the ingredients or provisions that are required to be proved as per law, are proved beyond reasonable doubt. In para-4 of the decision this Court observed as under :

"4. Having regard to the facts and circumstances, this Court has found that Rule-14 of the Prevention of Food Adulteration Rules, 1955 (`the Rules' for short) is mandatory and it is the duty of the prosecution to prove by leading the positive evidence that bottles were cleaned and dried before the sample was taken by the Food Inspector. It is therefore the duty of the prosecution to prove beyond the reasonable doubt that all ingredients or provisions that are to be proved as per law and especially provisions which are mandatory in nature have got to be proved beyond reasonable doubt. The manner of sending the sample for analysis is prescribed in Rule-14. It is very clear from the said rule that the sample of food for the purpose of analysis should be taken in clean and dry bottles or jars or in other suitable containers which shall be closed sufficiently tight to prevent leakage, evaporation or in the case of dry substance, entrance of moisture and should be carefully sealed. The prosecution main witness complainant - Food Inspector himself has not stated in his evidence about the compliance of the provisions of Rule-14. Rule-14 is held to be mandatory and there is no dispute about this fact. None compliance of mandatory rule is fatal to the prosecution. Since this appeal against the acquittal order can be disposed of only on this count, it would not be necessary to enter into the merits of other points on which acquittal is founded upon."

##. In the matter of Sudhirchandra B. Joshi, Food Inspector, Baroda Vs. Arvindkumar Naranbhai Patel and Ors, as reported in 1995 (2) G.L.H. (U.J. 24) 31, again this Court observed that duty is cast on prosecution not only to comply with the mandatory provisions but to lead evidence at the trial for its compliance. In para-6 of the said decision this Court observed as under :-

"In the cross-examination, the complainant has admitted that the sample bottles were not cleaned at the vendor's place. The sample bottles were delivered by the Stores Department. he has further stated that he has no information as to when and by whom these bottles were cleaned in the Stores. Even he is not in a position to say that whether his Peon cleaned the bottles for taking the samples. Thus, reading the evidence, it is clear that the Stores Department was

supplying the sample bottles wherein the samples were collected. Though he states that even the instrument for taking the sample was cleaned in the morning by Peon, the Peon is not examined. There is no satisfactory evidence to show that the mandatory requirement has been complied with."

##. In the matter of State of Gujarat vs. Gobar @ Gopal Tapubhai Dholariya, as reported in GLR 1996(1) 137, again this matter came up for the consideration of this Court and this Court observed that Rule-14 is mandatory and none observance thereto will be fatal to the prosecution case. In Para-6 this Court observed as under :-

"6. The appellate Court in Para-9 of its judgment has observed that the prosecution has failed to show that the material requirement of 'Rule-14 of the Bombay Prevention of Food Adulteration Rules, 1955 (Rules) were observed. It is also observed by the appellate Court that the prosecution did not examined person who had dealt with glass bottle in which sample of ground-nut oil was collected. There was no evidence to show that the material requirements of Rule-14 of the Rules were observed. Rule 14 reads as under :-

"Manner of sending samples for analysis :Samples of food for the purpose of analysis shall be taken in clean dry bottles or jars or in other suitable containers which shall be closed sufficiently tight to prevent leakage, evaporation, or in the case of dry substance, entrance of moisture and shall be carefully sealed."

Rule-14 if mandatory, non-observance thereof will be fatal to the prosecution case. This aspect, as such is not disputed in this appeal, with the result, since the prosecution has failed to show that material requirements of Rule-14 of the Rules are satisfied, the impugned acquittal order cannot be disturbed. It would not be necessary to address to the other infirmities considered by the appellate Court, since the appeal is liable to be dismissed against the impugned order of acquittal on this sole ground."

##. In 1999, again the question came up for the consideration of this Court in the matter of Gangadhar

Yashvant Ramekar vs. Mukeshbhai B. Shah, as reported in GLR 1999 (2) 1105, this Court observed that the breach of mandatory Rule-14 entitles the accused to acquittal. In Paras-12 and 12.1 this Court observed as under:-

> "12. Now, therefore, comes the question whether, on merits, the prosecution has been able to establish the case against the accused persons.
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> 12.1 In this regard, it may be noted that the evidence of the complainant, at Ex.31, if perused, indicates that he had no personal knowledge about the cleaning of bottles in which the samples were taken. He did not have any information or knowledge as to who cleaned those bottles and when. It would, therefore, be a matter of doubt whether the bottles were really cleaned or not. When the bottles were shown to the Panch witness, it transpires from the evidence that the cork was closed and, therefore, in light of the decision of this High Court in the case of Sudhirchandra B. Joshi vs. Arvindkumar Naranbhai Patel & Ors. Criminal Appeal No.1013 of 1988, delivered on 12th July, 1995, the requirements of Rule 14 cannot be said to have been complied with. In the said decision, it was observed that the person who cleaned the bottles was not examined and there was satisfactory evidence to show that the mandatory requirements were not complied with and, therefore, the benefit was given to the accused persons relying upon the decision of this High Court in the case of M.B.Risaldar v. Radheshyam, as reported in 1980(2) GLR 136. The facts of the present case are identical as can be seen from the deposition of the complainant."

##. In 1999 again when question came up for the consideration in the matter of State of Gujarat vs. Bhagchand Sadhumal & Anr., as reported in GLR 1999 Vol.XL (3) 2220, this Court again ruled that failure to prove the use of clean and dry bottle beyond reasonable doubt would result in acquittal of the accused. In para-12 this Court observed as under :-

> "12. In the evidence of the Food Inspector, he has stated that the samples were collected in dry and clean bottles. However, in the crossexamination, he has stated that the stoppers were not cleaned at that time. He has further

stated that the cleaned stoppers were taken with him. He has also stated that the bottles were brought by the Peon. He was also question whether the bottles were cleaned on the spot or not. In answer to that question, it appears to have been stated by him that it is not correct to say that the bottles were not cleaned on the spot. the tenor of the evidence indicates that wherever suggestion was made and it was accepted as correct, the trial Court has written the sentence as "it is true that ..... ", i.e., in the affirmative form. Wherever suggestion was made and was denied the trial Court has recorded it as "It is not true ... ...", i.e., in the negative form. So far as the cleaning of the bottle is concerned, the sentence does not begin with either "It is not true" or "It is true". The evidence is not correctly written so far as this aspect is concerned as the last word is not completely written. With regard to the spoon used, the trial Court has not proceeded in the positive or negative form but has stated that on the spot the spoon was not cleaned. With regard to the bottles, possible, the witness must have answered that it is false to say that the bottles were not cleaned on the spot. However, in Gujarati language, the evidence recorded reads as : "bottle sthal upar saff karel nathi thei kho-che".

Thus, the evidence is not clearly written. In the last words, "kho - che" ( ), middle letter is missing and the tenor of first letter is such that it is difficult to reject the contention raised by defence Advocate, Benefit must go to the accused. If that be so, there is no convincing evidence that the bottles used for collecting the samples were clean and dry."

##. Thus, this Court has taken consistent view that noncompliance of Rule-14 and failure to prove compliance during trial of necessary ingredients of Rule-14 would result in the acquittal of the accused. As said above, so far as facts are concerned, it is not proved by the prosecution beyond reasonable doubt that the bottles in which the sample for analysis was stored were cleaned and dried. The peon who is referred by the Food Inspector in deposition to have cleaned the bottles in the presence of Food Inspector has not been examined. It is not proved that when these bottles were cleaned and whether they

were dried at the time of the use of the bottles, because Food Inspector stated that he could not remember on which date the bottles were cleaned and dried. We cannot agree with the contentions advanced on behalf of the State by learned APP relying upon the decision of Hon'ble Supreme Court in the matter of State of Karnataka vs. Appa Balu Ingale and others, as reported in AIR 1993 Supreme Court 1126. It is true that ordinarily it is not open to the High Court to interfere under the powers under Section 401 by reappreciating the evidence but the circumstances in this case firstly, are not ordinary and that the question of reappreciation of evidence would not arise. What is involved is a law point that whether breach of Rule-14 is committed and what would be the result of such breach if committed by the Food Inspector. The facts so far as they relate to this legal issue will have to be seen and, therefore, the question of reappreciation of evidence already recorded and reappreciated by the Court below would not arise. Both the Courts below have wholly failed to consider this aspect. The Court of law cannot ignore the legal position and the established law is as narrated above. On the ground that the High Court would not interfere ordinarily in concurrent findings of both the Courts below while exercising powers under Section 401 illegality cannot be perpetuated when breach is proved by the evidence of the prosecution reading the evidence as it is even without appreciating. Further this Court has ample power to interfere even if there be concurrent finding by both the Courts below, for the breach committed of Rule-14 and failure to establish mandatory requirement of Rule-14 during trial by the prosecution the accused would be entitled to acquittal and, hence, this Revision Application deserves to be allowed.

##. In view of what is discussed above, this Criminal Revision Application is allowed. Judgment and order dated 30.10.1985 passed by the learned Chief Judicial Magistrate, Bhavnagar in Criminal Case No.967/1994 convicting the present petitioners as well as the judgment and order dated 5.8.1994 passed by the learned Additional Sessions Judge, Bhavnagar in Criminal Appeal No.17/1986, confirming the judgment of Chief Judicial Magistrate, Bhavnagar are set aside. The petitioners are acquitted of the charges framed against them. The amount of fine if paid, by any of the petitioners be returned to the respective accused. The bail bonds submitted by the petitioner stands cancelled. Rule is made absolute.

(J. R. VORA, J.)

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